No. 92-1910

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MARIANO LETTIERI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN PETITION FOR WRIT OF CERTIORARI

JEFFREY B. STEINBACK
LEONARD C. GOODMAN
GENSON, STEINBACK, GILLESPIE & MARTIN
53 W. Jackson Blvd. Suite 1420
Chicago, IL 60603
(312) 726-9015

Attorneys for Petitioner Mariano Lettieri

BEST AVAILABLE COPY

TABLE OF CONTENTS

I. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO OVERTURN THE OUTRAGEOUS DECISION OF THE SEVENTH CIRCUIT SANCTIONING THE USE OF REPEATED, FLAGRANT AND ESCALATING PROSECUTORIAL MISCONDUCT TO OBTAIN A CRIMINAL CONVICTION..... 1

II. THE RULING BY THE SEVENTH CIRCUIT, THAT THE PROSECUTOR'S MISCONDUCT MUST BE SO EGREGIOUS THAT THE JURY WOULD HAVE RETURNED A DIFFERENT VERDICT, CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF EVERY OTHER CIRCUIT..... 2

III. THE SEVENTH CIRCUIT'S RULING THAT THE DEFENDANT HAD NO RIGHT TO CONFRONT OR CHALLENGE THE EVIDENCE UPON WHICH HIS SENTENCE WAS BASED CONFLICTS WITH THE WELL ESTABLISHED CONSTITUTIONAL PRINCIPLES OF DUE PROCESS AND THE RIGHT TO CONFRONT ONE'S ACCUSERS..... 18

IV. THE SEVENTH CIRCUIT'S FINDING THAT TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INADEQUATE FOR FAILING TO OBJECT TO THE REPEATED IMPROPER ATTACKS UPON THE DEFENDANT AS WELL OTHER DAMAGING EVIDENCE IMPROPERLY ADMITTED, CONFLICTS WITH THE PRINCIPLES ANNOUNCED IN STRICKLAND V.WASHINGTON..... 21

TABLE OF AUTHORITIES

CASES

Berger v. United States, 295 U.S. 78 (1935) 4-5, 15

Chapman v. California, 386 U.S. 18 (1967) 8

Solles v. Israel, 868 F.2d 242 (7th Cir.), cert. denied, 490 U.S. 1101 (1989) 2, 3

United States v. Badger, 983 F.2d 1443 (7th Cir. 1993) 16

United States v. Bibbero, 749 F.2d 581 (9th Cir. 1984) 23

United States v. DeGeratto, 876 F.2d 576 (7th Cir. 1989) 9

United States v. Hasting, 461 U.S. 499 (1983) 8

United States v. Martinez, 514 F.2d 334 (9th Cir. 1975) 10

United States v. Roberts, 881 F.2d 95 (4th Cir. 1989) 20

United States v. Silverstein, 737 F.2d 864 (10th Cir. 1984) .. 9

United States v. Smith, 962 F.2d 923 (9th Cir. 1992) 13

United States v. Urbanik, 801 F.2d 692 (4th Cir. 1986) 22

United States v. Vargas, 583 F.2d
380 (7th Cir. 1978) 4, 10

United States v. Wolf, 787 F.2d 1094
(7th Cir. 1986) 9

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MARIANO LETTIERI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF IN PETITION FOR WRIT OF CERTIORARI

I. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO OVERTURN THE OUTRAGEOUS DECISION OF THE SEVENTH CIRCUIT SANCTIONING THE USE OF REPEATED, FLAGRANT AND ESCALATING PROSECUTORIAL MISCONDUCT TO OBTAIN A CRIMINAL CONVICTION.

The government has not responded to Petitioner's argument that this case calls for an exercise of this Court's supervisory power to overturn the decision of the Seventh Circuit. Accordingly, Petitioner will stand on the arguments set forth is his Petition for

Writ of Certiorari.

II. THE RULING BY THE SEVENTH CIRCUIT, THAT THE PROSECUTOR'S MISCONDUCT MUST BE SO EGREGIOUS THAT THE JURY WOULD HAVE RETURNED A DIFFERENT VERDICT, CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF EVERY OTHER CIRCUIT.

In our Petition, we allege that the standard of scrutiny adopted by the Seventh Circuit for reviewing the errors at Mario Lettieri's trial conflicts with the standard of review applied by every other federal appellate court in the United States. The government contends, in its brief in opposition, that the Seventh Circuit applied a proper standard of review, noting the court cited Solles v. Israel, 868 F.2d 242 (7th Cir.), cert. denied, 490 U.S. 1101 (1989), as authority for its reduced level of scrutiny. However, Solles involved the review of a habeas challenge to a state court conviction rather than a direct appeal. The court there stated that its

only role was "to protect against error of constitutional dimension." Id., 868 F.2d at 245. The court further recognized "that on habeas review we do not exercise the supervisory powers that we may employ on direct appeal from trials in the federal district courts and, thus, our appellate scrutiny is somewhat constrained." Id. (emphasis added). Thus the Seventh Circuit's reliance on Solles to reduce the level of scrutiny available on direct appeal of a criminal conviction is entirely improper and sets a dangerous precedent.

The government alternatively argues that the Seventh Circuit's level of review was not erroneous because "the court of appeals in this case carefully considered each of petitioner's claims of prosecutorial misconduct and determined that petitioner had not been denied a fair trial." (Govt. Brief at p. 5) The

government is mistaken. In reality, the Seventh Circuit ignored the most egregious episodes of misconduct while it misrepresented and sanitized the remaining episodes.

First, the government contends that the court below "properly held that curative instructions were sufficient to cure the effect of the prosecutor's request that petitioner produce a photograph of his boiler room ... and the prosecutor's closing remark that the jury should send a message by convicting petitioner." (Govt. Br. at pp. 5-6) However, the courts have repeatedly held that mild judicial action, such as instructing the jury to disregard improper argument, is not sufficient to cure the evil caused by inflammatory prosecutorial misconduct. See Berger v. United States, 295 U.S. 78 (1935); United States v. Vargas, 583 F.2d 380, 387 (7th

Cir. 1978). As stated in Berger,

> The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for a stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.

295 U.S. at 85.

The record of Lettieri's trial reveals that the prosecutor improperly asked Lettieri on cross-examination to "[g]o over there [to counsel table] and get the picture [of the boiler room]" knowing that Lettieri possessed no such photograph. Defense counsel objected to the question and asked that it be stricken. The trial court sustained the objection and ruled that the "question is stricken." No curative measures were taken such as instructing the jury that

no negative inference may be drawn from Lettieri's failure to produce this evidence. Similarly, the trial court sustained an objection to the prosecutor's "send a message" argument and ruled that the argument be stricken from the record. Here again and contrary to the government's suggestion, the court took no curative measures such as instructing the jury that "sending a message" to other persons is not a proper reason to convict the defendant. As in Berger, "[i]t is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken."[1]

---

[1] The government further contends, in a footnote, that the "send a message" argument was "properly understood as telling the jury to send a message by holding petitioner to the standard of the law." (Govt. Br. at p. 6 n.3) This is patently false. The prosecutor told the jury: "By your verdict of guilty you send a message, not just to these individuals but to all individuals who are out there thinking of doing the same thing."

More fundamentally, the prosecutor's misconduct in demanding that Lettieri produce certain exculpatory evidence (a photograph of his boiler room), was an error of constitutional magnitude because it abridged the defendant's right to remain silent and to be presumed innocent. The prejudicial impact of this error was magnified when, during closing argument, the prosecutor directly argued to the jury that Lettieri's failure to produce this evidence was "[b]ecause he knew there undoubtably is a water heater or something like that right next to the boiler room." This Court has repeatedly held that misconduct which rises to the level of constitutional error must be proven harmless beyond a reasonable

---

Regardless of the context in which this argument was delivered, there is no getting around its plain meaning which is to ask the jury to find the defendants guilty in order to send a message to all individuals who are thinking about dealing drugs.

doubt. United States v. Hasting, 461 U.S. 499, 510-11 (1983); Chapman v. California, 386 U.S. 18, 24 (1967). The Seventh Circuit's finding that the first reference to the missing evidence was cured by the district court and that the second reference "was not so prejudicial as to render the trial fundamentally unfair" is in direct contravention of the longstanding principles of Hasting and Chapman. The Seventh Circuit blatantly ignored this Court's mandate that such constitutional errors be proven harmless beyond a reasonable doubt. Indeed, it would be impossible to declare these errors harmless in light of the suspect nature of the proof against Mario Lettieri.

Second, the government contends that the Seventh Circuit properly applied plain error analysis to dispose of Petitioner's claim that the prosecutor

improperly attacked Lettieri's credibility with inflammatory and groundless accusations of prior misconduct. The trial record reveals that, during cross-examination, the prosecutor accused Lettieri, without any basis, of being an outlet for stolen goods and of dealing drugs for a third party not connected with the case. It is well established that a prosecutor may not insinuate that the accused has committed a prior, unrelated offense unless the government is prepared to prove it. United States v. Wolf, 787 F.2d 1094, 1099 (7th Cir. 1986); United States v. DeGeratto, 876 F.2d 576, 586 (7th Cir. 1989) (unsupported accusations "so inflammatory" as to constitute plain error); United States v. Silverstein, 737 F.2d 864, 868 (10th Cir. 1984) (The government is not entitled to use impeachment of the defendant as a "guise

for submitting to the jury substantive evidence that is otherwise unavailable.") Moreover, evidence of prior drug dealing improperly admitted against a defendant in a drug prosecution has been held to be particularly prejudicial. United States v. Vargas, 583 F.2d 380, 388 (7th Cir. 1978); United States v. Martinez, 514 F.2d 334 (9th Cir. 1975). Ignoring the uniquely harmful effect of such improper accusations, the Seventh Circuit merely sweeps these errors under the rug of the harmless error doctrine. The government here contends that Seventh Circuit's treatment of these errors was "correct." This Court should find otherwise.

Next, the government contends, without explanation, that the Seventh Circuit "was justified in its conclusion that no plain error occurred when the prosecutor referred to petitioner's defense as 'contrived.'" (Govt. Br. at

p. 6) However, as we point out in our Petition, the court below ignores the more egregious comment, challenged by Lettieri on appeal, where the prosecutor summons up his own experience to tell the jury that Lettieri's defense is the most contrived "I've ever seen." The government similarly ignores this comment while erroneously asserting that "the court of appeals in this case carefully considered each of petitioner's claims of prosecutorial misconduct ...." (Govt. Br. at p. 5)

Next, the government asserts, again without explanation, that the court below "also correctly found that there was no prosecutorial misconduct, much less plain error, when the prosecutor elicited the terms of a government witness's plea agreement and referred back to that testimony in closing argument." (Govt. Br. at p. 7) However, the government

ignores the fact that Lettieri's claim of improper vouching did not involve the government's eliciting from its witnesses the terms of their plea agreements. The court below has misstated, trivialized and sanitized Lettieri's claim of improper vouching so that it could be more easily disposed of. The government here expresses its approval of this evasion.

In reality, Lettieri has repeatedly challenged the following three incidents of improper vouching for government witnesses:

(1) Testimony elicited from Howard Lucas that the trial judge would determine whether his testimony was truthful, and if the judge determines that his testimony was untruthful Lucas will get "forty years [incarceration] plus some more."

(2) The prosecutor concluded his cross-examination of Lettieri with the following blatant suggestion that the government's witnesses are inherently more credible than Lettieri because they have pled guilty:

Q Mr. Lettieri, you're saying that Michael Gomire and Howard Lucas are lying when they say they picked up narcotics from you, is that correct, sir?

DEFENSE COUNSEL: Objection, your Honor.

THE COURT: That he may answer. Overruled.

A Evidently they are, yes, sir.

Q Now, sir, you understand that they have pled guilty in this case, don't you?

A Yes. From what I understand, they pled guilty to the case.

Q Who's got a greater interest in this case at this time, sir?

(3) The prosecutor's statement during closing argument that Howard Lucas "could get 30 years incarceration if Judge Plunkett deems his testimony untruthful."

In a footnote to its brief, the government contends that United States v. Smith, 962 F.2d 923 (9th Cir. 1992), a case cited by Petitioner, is distinguishable because there "the prosecutor vouched for a government witness and repeatedly staked the

government's and the court's prestige on the veracity of the testimony presented.... In contrast, the court in this case found the prosecutor had not vouched for Lucas's veracity, but merely referred to Lucas's properly admitted testimony that he was required to tell the truth or face perjury." (Govt. Br. at p. 7 n.5; citation omitted)

This response by the government is wholly unsatisfactory and reveals its complete unwillingness to look at the realities of Mario Lettieri's trial in lieu of the sanitized version supplied by the court below. Howard Lucas' plea agreement contains no statement about the trial judge evaluating Lucas' veracity. Thus the references to Judge Plunkett in Lucas' direct examination and in the government's summation clearly went beyond the witness' understanding of his plea agreement. More significantly, the

prosecutor flagrantly vouched for both Gomire and Lucas when he asked the defendant who had the greater interest in the case. As in Smith, by offering this evidence and argument, the prosecutor improperly staked the government's and the court's prestige on the veracity of the testimony presented.

Finally, the government also attempts to save Lettieri's conviction by pointing to the Seventh Circuit's finding that the "strong weight of the evidence was against Lettieri." Therefore, the government argues, this case is unlike Berger v. United States, 295 U.S. 78 (1935), "where the evidence against the defendant '[is] not strong' and the cumulative effect of the prosecutor's misconduct 'cannot be disregarded as inconsequential.'" (Govt. Br. at p. 8) However, the characterization of the evidence against Lettieri as "strong" by

the court below does not make it so. This Honorable Court has the ability and the obligation to make its own evaluation of case against Lettieri.

The Drug Enforcement Administration ("DEA") began investigating Nedrick Miller and the drug operation at the Washington Pines Apartments in late 1987. United States v. Badger, 983 F.2d 1443, 1447 (7th Cir. 1993) (Pet. App. A-3). This investigation continued for more than one year during which time the DEA conducted intense surveillance of the building, tapped the building's telephones, and conducted undercover buys with the help of a confidential informant called Top Cat. (Pet. App. A-3-4) Yet, despite all of its efforts, the DEA did not find one shred of evidence linking Mario Lettieri to the illegal operation.

At trial, DEA agents and police officers gave extensive testimony

describing the drug operation and its participants. However, not one of these witnesses presented any evidence implicating Lettieri in any illegal activity. The government also played a large number of taped telephone conversations obtained from wiretaps of Miller's personal telephone as well as other telephones in his building. Not one of these taped conversations involved Lettieri. Rather, as in Berger v. United States, Mario Lettieri was convicted entirely on the testimony of alleged accomplices with long criminal records, each testifying pursuant to generous plea agreements. Under these circumstances, the willingness of the court below to overlook the possibility that the numerous incidents of prosecutorial misconduct contributed to the verdict is unconscionable.

III. THE SEVENTH CIRCUIT'S RULING THAT THE DEFENDANT HAD NO RIGHT TO CONFRONT OR CHALLENGE THE EVIDENCE UPON WHICH HIS SENTENCE WAS BASED CONFLICTS WITH THE WELL ESTABLISHED CONSTITUTIONAL PRINCIPLES OF DUE PROCESS AND THE RIGHT TO CONFRONT ONE'S ACCUSERS.

The government contends that it was not improper to determine Lettieri's sixteen-year sentence from the hearsay statements of an unavailable witness, Nedrick Miller, because the court below found that "Miller's testimony that petitioner supplied 36 kilograms of cocaine to the scheme was not contradicted by the trial record." (Govt. Br. at p. 8) Here again, however, the fact that the Seventh Circuit found no contradictions doesn't make it so. A fair review of the trial record reveals tremendous inconsistencies between the hearsay proffer and the trial evidence.

First, the hearsay proffer has Lettieri supplying thirty-six kilograms of cocaine to the conspiracy before

Lettieri was even a member of the conspiracy according to the trial evidence. According to government witness Michael Gomire, Lettieri joined the conspiracy in the summer of 1988 when "Miller invited Gomire to participate in a consignment sale of Lettieri's cocaine." (Pet. App. A-3) However, in the hearsay proffer admitted at sentencing, Miller told DEA Agent Riley that he bought thirty-six kilograms of cocaine from Lettieri beginning in late 1987 and continuing for six months. Thus, according to the evidence at trial, Lettieri was not even a member of the conspiracy during the period in which the government alleged he supplied the thirty-six kilos of cocaine. A defendant cannot be held responsible for conduct occurring outside of the time in which he was a willful member of the conspiracy and aware of its purpose. United States

v. Roberts, 881 F.2d 95, 101 (4th Cir. 1989).

Second, the amount of cocaine introduced in the proffer, the most critical piece of information for the determination of sentence, is more than six times greater than the amount of cocaine that the trial witnesses alleged Lettieri supplied. At trial, Michael Gomire, the man in charge of the drug-selling operation, testified that Lettieri supplied a total of three or four kilograms of cocaine to the operation. It is inconceivable that Lettieri could have supplied thirty-six kilograms of cocaine without the knowledge of the man responsible for selling the cocaine.

The government acknowledges in its brief that hearsay is admissible at sentencing only if it is determined to be reliable. Here, the Assistant United

States Attorney admitted, at Lettieri's sentencing, that one of the reasons the government never called Miller as a trial witness was that "he was not completely candid with the government ...." DEA Agent Riley admitted that in an earlier proffer, Miller had stated that he never bought cocaine from Lettieri. For these reasons, the Seventh Circuit's finding that the hearsay proffer has sufficient indicia of reliability to support its probable accuracy is grounded upon fantasy and not fact.

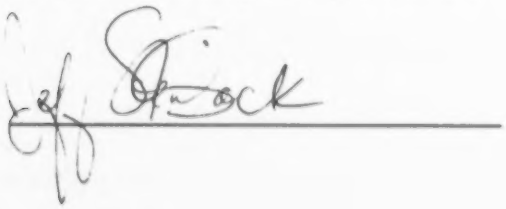
IV. THE SEVENTH CIRCUIT'S FINDING THAT TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INADEQUATE FOR FAILING TO OBJECT TO THE REPEATED IMPROPER ATTACKS UPON THE DEFENDANT AS WELL OTHER DAMAGING EVIDENCE IMPROPERLY ADMITTED, CONFLICTS WITH THE PRINCIPLES ANNOUNCED IN STRICKLAND V. WASHINGTON.

In our Petition, we allege that Lettieri was particularly prejudiced by trial counsel's failure to object to Annette Daggs' hearsay testimony that

Miller told her that a briefcase full of cash was for "Mario" and Michael Gomire's hearsay testimony that Miller told him that a kilogram of cocaine came from "Mario." In response, the government argues that "[b]ecause Daggs and Gomire were part of the conspiracy, and Miller's statements were made in furtherance of that conspiracy, those statements were admissible under the coconspirator exception to the hearsay rule." (Govt. Br. at p. 9; citation omitted) It is well established, however, that hearsay statements which merely inform a conspirator of the ownership of contraband do not further the conspiracy and are not admissible under the coconspirator exception. See United States v. Urbanik, 801 F.2d 692 (4th Cir. 1986) (Coconspirator's statement identifying defendant as the conspirator's "connection" for marijuana

was not made in furtherance of the drug conspiracy and was not admissible under the coconspirator exception to the hearsay rule.); United States v. Bibbero, 749 F.2d 581, 583-84 (9th Cir. 1984). Trial counsel's failure to object to this testimony cannot be excused nor can its prejudicial impact be ignored.

Respectfully submitted,



JEFFREY B. STEINBACK
LEONARD C. GOODMAN
GENSON, STEINBACK, GILLESPIE & MARTIN
53 W. JACKSON SUITE 1420
CHICAGO, ILLINOIS 60604
(312) 726-9015